Supreme Court, U. S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

IN THE UNITED STATES SUPREME COURT
WASHINGTON ,D.C.

CASE NO.
79-1674

ROBERT J. KONDRAT
Petitioner

vs.

PAUL H. MITROVICH, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Rule Subparagraph No.		Page No.
23a)	Court References.....	1
23b)	Statement of the Grounds ..	1
23c)	Questions Presented for Review.....	2
23d)	Constitutional Provisions .	2
23e)	Statement of the Case.....	2
23f)	Jurisdiction.....	5
23g)	not applicable.....	-
23h)	Argument.....	7
	APPENDIX	
23i)	Opinion of State Court (4 pages).....	9
23j)	Decree of State Court.....	13
	SERVICE.....	14

PETITION FOR WRIT OF CERTIORARI

In accordance with the following applicable subparagraphs of Rule 23 of the Supreme Court of the United States, Petitioner petitions this court for a writ of certiorari to review judgement of the State of Ohio Courts.

23a) In the official report delivered by the State of Ohio Court, Petitioner's appeal to that court was dismissed for the reason that no substantial constitutional question existed. Appended hereto is copy of same report.

23b) The date of the decree sought to be reviewed is March 14, 1980. The statutory provision conferred on this court to review the decree in question by writ of certiorari, is Article III of the Constitution of the United States, which created the Supreme Court as a constitutional court, giving judicial power to all cases, in law and equity, that arises under the Constitution.

23c) The question presented for review is: Does a substantial Constitutional question present itself, when an Appellate Court renders a decision based on issues other than those presented in the appeal, and to which the Appellant is denied the opportunity to address and argue the issues upon which the court's decision was arrived?

23d) The constitutional provision which the case involves is The Fourteenth Amendment to the Constitution which guarantees due process of law.

23e) This case involves an attempt to recall public officials by a referendum petition circulated by citizens. The recall of public officials is not a crime in the state of Ohio nor in this nation. The circulation of referendum petitions is a lawful activity. The Petitioner and others are entitled to protection under the law the same as others that engage in

lawful pursuits. Yet, the Petitioner was arrested and deprived of his liberty simply because his lawful acts were offensive to public officials. The Fourteenth Amendment to the Constitution of the United States guarantees that no state deprive any person within its jurisdiction the equal protection and due process. Yet, the decree of the Supreme Court of Ohio amounts to a denial of these guaranteed rights. This decree is not in accord with the applicable constitutional provisions, nor is it in accord with the applicable decisions of this court. Judicial officers who know by virtue of the facts that there is no basis for a criminal prosecution cannot be allowed to proceed with it maliciously. In this instance, the Respondents suppressed material evidence that would have shown no basis for an indictment. The suppression eventually was

born out by a trial and dismissal of the charges. The courts have ruled that public policy allows judicial officers certain immunities. This must be balanced against the rights of individuals which are guaranteed by the Constitution of the United States. The Respondents well knew at the incipient stage of their involvement, which was during the investigative and/or administrative phases of judicial proceeding, that the alleged criminal activity brought against Petitioner was fabricated for the sole purpose of securing indictments; they well knew that without criminal intent there is no crime; and they well knew that the guilt of the accused had to be established beyond a reasonable doubt. Yet in spite of all this, the Respondents caused to permit a trial, at great expense to the taxpayers, in which the fabricated criminal

activity against Petitioner was laid bare, and in which no crime was established or guilt proven. The Respondents did not seek justice - they wanted only to convict. They did not exercise restraint in the discretionary exercise of governmental powers - they conspired to promote government retribution. Their decisions affecting the public interest were not fair - they burdened the taxpayers with an expensive trial that proved to be a fiasco because of their unfairness to public interests. They did not give the accused the benefit of all reasonable doubts - their secrecy and the subsequent exposure of their scheme attested to this. Such abuse of power of Respondents' office cannot be condoned by the Taxpayers not can it be allowed to go unanswered by this court.

23f) In the court of first instance, the Respondents pleaded immunity, citing Imbler

vs. Pachtman, 424 U.S. 409, 1976, to Petitioners complaint. The court of first instance returned a judgement entry sustaining the Respondents' Motion for Summary Judgement. Petitioner appealed to the court of second instance; the Eleventh Appellate District Court of Ohio, pleading that the Imbler Doctrine was not applicable to this case. The court of the second instance agreed with the Petitioner and rendered an Opinion stating that "the case of Imbler vs. Pachtman, 47 L. Ed 2d 128 has no application to this case". However, the court affirmed the decision of the court in the first instance by rendering a decision based on issues other than those presented in the appeal. Petitioner appealed to the court of third instance, the Ohio Supreme Court, citing the Fourteenth Amendment to the Constitution of the United States, and the fact that

Petitioner was denied due process of law because the Appellate Court's decision was not based on the issue presented, and that this lack of continuity within the judicial system, denied the Petitioner the right to address and argue the issues used by the court to arrive at its decision. The court of the third instance dismissed the appeal for reason that no Constitutional question existed.

23g) Not applicable to this case.

23h) This court is asked to permit the writ because the court in the second instance, the Appellate Court, had departed so far from the accepted and usual course of judicial proceedings that a call to this court to exercise its power of supervision is necessary. This case started with Petitioner's Complaint - Respondents' defense was immunity - the court rendered a decision in favor of Respondents -

Petitioner appealed pleading that immunity was not applicable to this case - Appellate Court agreed that immunity was not applicable, but returned a decision in favor of Respondents on issues not presented in the appeal. Petitioner appealed to the Ohio Supreme Court citing the Fourteenth Amendment and the fact that Petitioner was denied due process of law because the Appellate Court's decision was not based on the issue presented, and that this departure denied Petitioner the right to address and argue the issues upon which the court used to arrive at its decision. The law of the land provides for the opportunity to be heard not only on the pertinent questions in the matter involved, but provides for the opportunity to be heard on such irrelevant questions that the courts may use to base its decision.

STATE OF OHIO, LAKE COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

FILED
COURT OF APPEALS
DEC 3 1979
MELVIN S. REED
CLERK OF COURT
LAKE COUNTY, OHIO

ROBERT J. KONDRAT,

PLAINTIFF-APPELLANT,

- VS -

PAUL MITROVICH, JOHN E. SHOOP and STEPHEN J. FUTTERER,

DEFENDANTS-APPELLEES.

OPINION.

CASE NO. CA 7-113

RECEIVED
DEC 4 1979

APPEARANCES.

Robert J. Kondrat, Pro Se, 29121 Chardon Road, Willoughby Hills, Ohio 44092.

James F. Sweeney, Cleveland, Ohio, for Defendants-Appellees.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ.,
of the Seventh Appellate District,
and
Hon. Sam H. Bell, J., of the
Eighth Appellate District, Sitting
by Assignment in the Eleventh
Appellate District.

Dated: December 3, 1979

O'NEILL, J.

The appellant filed a complaint in the lower court contending that, at relevant times, the defendant Paul Mitrovich was Prosecutor of Lake County, Ohio; defendant Stephen J. Futterer was an Assistant Prosecutor; and defendant John Shoop was successor to Mitrovich.

The complaint went on to allege that Prosecutor Mitrovich obtained indictments against four Lake County residents and that these indictments which were dismissed were uncalled for, discriminatory and were terminated at great expense to the taxpayers. There was the further allegations that defendants Shoop and Futterer by their failure to recognize the fiasco contributed to the waste of taxpayer's money. The complaint prayed that the defendants be ordered to repay all public monies expended and expenses incurred in the prosecution of the four cases.

The three defendants filed a joint motion for summary judgment. Attached thereto were affidavits by each wherein each admitted that at all times relevant, he was engaged in his official duties as prosecutor. In support of the motion, the defendants cited the case of Imbler v. Pachtman, 47 L. Ed. 2d 128, as giving them immunity in this action. The court sustained the motion.

The case of Imbler v. Pachtman, 47 L. Ed. 2d 128, has no application to this case. "Imbler" very specifically dealt with deprivation of a person's constitutional rights. Title 42, U.S.C. Sec. 1983 (42 USCS Sec. 1983) provides in

part that every person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. The Imbler court decided that state prosecutors were immune from liability for damages under 42 USCS Sec. 1983 for acts done in the scope of their duties which acts allegedly deprived a person of constitutional rights. Unfortunately the constitution does not provide the right to a taxpayer that a public official will not make accidental or purposeful waste of tax monies. It then follows that since the contention of the complaint is needless waste, there was no deprivation of a constitutional right.

However, the final judgment of the lower court should be affirmed. Upon a review of the file, it can easily be concluded that all of the actions of the defendants involved an exercise of discretion and that all of the actions were within the statutory duties of prosecutors. The courts are, and should be, reluctant to interfere with the action of public officers in matters resting in their discretion. 52 Ohio Jurisprudence 2d 33, Taxpayers actions Sec. 23. In the absence of bad faith or a corrupt motive, a public officer acting within his authority cannot be held liable individually for the performance of his duties, even if his performance involves an error in judgment.

> "It is quite proper to say that matters in general that are committed to the pure discretion of a public officer, and loss to the public in funds or character of service, could not be availed of in a suit against the public officer * * *" Crane v. Secoy, 103 Ohio St. 258, 260.

Perhaps the appellant feels that, in his instance, the prosecutors should have acted differently. The prosecutorial process, however, should be reasonably free of personal restraint and generally free of personal opinion.

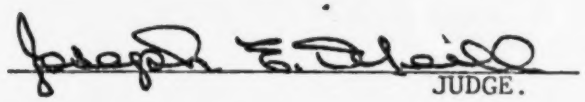
In the absence of any allegation of corruption on the part of defendants, the trial court properly dismissed the action.

Judgment affirmed.

Donofrio, J., concurs.

Bell, J., concurs.

APPROVED:



JUDGE.

Hon. Joseph E. O'Neill,
Hon. Joseph Donofrio, JJ., Seventh District,
Hon. Sam H. Bell, J., Ninth District,
Sitting by Assignment in Eleventh District.

SC-10A 79-10-1 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

RECEIVED MAR 15 1980

THE STATE OF OHIO,
City of Columbus.

Robert J. Kondrat,
Appellant,

vs.

Paul H. Mitrovich et al.,
Appellees.

*19*80 *TERM*

To wit: March 14, 1980

No. 80-49

APPEAL FROM THE COURT OF APPEALS

for LAKE *County*

This cause, here on appeal as of right from the Court of Appeals for LAKE *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for LAKE *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SERVICE

A copy of the foregoing PETITION FOR WRIT OF CERTIORARI was mailed by regular United States mail, first class postage prepaid, on this _____ day of April, 1980 to Attorney for Respondents, James F. Sweeney, 630 Bulkley Bldg., Cleveland, Ohio 44115.

ROBERT J. KONDRAT, pro se
29121 Chardon Road
Willoughby Hills, Ohio
44092

cc: News Media

Supreme Court, U. S.
FILED
MAY 9 1980
MICHAEL BODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979
No. 79-1674

ROBERT J. KONDRAT,
Petitioner,

vs.

PAUL MITROVICH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities I

Statement of Facts 1

Reasons for Denying the Writ 3

A Reviewing Court Must Affirm a Judgment of a Lower Court If It Can Be Supported on Any Ground 3

Conclusion 4

TABLE OF AUTHORITIES

Cases

Crane v. Secoy, 103 Ohio St. 258 (1921) 2

Newcomb v. Dredge, 105 Ohio App. 417 (1957) 3

Ryerson v. United States, 312 U.S. 405 (1941) 3

Supreme Court of the United States

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TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Petitioner's Brief is somewhat misleading as to the nature of this action. The instant action is *not* one for false arrest, malicious prosecution, etc. Rather, it purports to be a taxpayer's action to recover from the defendant all public moneys expended in regard to certain criminal actions against the defendant.

Petitioner filed his Complaint in the Court of Common Pleas, Lake County Ohio alleging that Judge Paul Mitrovich, while the Lake County Prosecutor, wrongfully caused Petitioner to be indicted. A Motion For Summary Judgment was filed based upon the defense of immunity. The Motion was granted by the trial court.

Petitioner then appealed to the Ohio Court of Appeals, Eleventh Appellate District. The Court of Appeals held that the trial court erred in finding that Respondent Mitrovich was absolutely immune from suit. However, the appellate court affirmed the judgment based upon long-established Ohio authorities to the effect that a public officer acting within his authority cannot be held personally liable in a taxpayer's action for errors in judgment. See, e.g., *Crane v. Secoy*, 103 Ohio St. 258 (1921).

Petitioner next filed a Notice of Appeal to the Ohio Supreme Court, alleging in his Notice that the case involved a substantial Constitutional question. Petitioner asserted in his Memorandum In Support Of Jurisdiction that the Court of Appeals violated his right of due process by deciding the case on a ground other than that relied upon by the trial court. The Ohio Supreme Court refused to assume jurisdiction over the matter, finding that there was no substantial Constitutional question.

Petitioner has now filed a Petition For Writ Of Certiorari with this honorable Court. The only Constitutional right involved is the Due Process guarantee of the Fourteenth Amendment. The only alleged violation of that right is the action of the Ohio Court of Appeals in affirming the judgment in favor of the Respondent on a ground independent of that relied upon by the trial court.

REASONS FOR DENYING THE WRIT

A REVIEWING COURT MUST AFFIRM A JUDGMENT OF A LOWER COURT IF IT CAN BE SUPPORTED ON ANY THEORY.

Petitioner's Brief evinces a fundamental misunderstanding of the function of an appellate court. It is axiomatic that an appellate court affirms or reverses judgments, not the reasons therefor. The rule was recognized by this Court in *Ryerson v. United States*, 312 U.S. 405 (1941) (Syllabus 1). The same rule is adhered to by the Ohio courts.

> It is the duty of a reviewing court to affirm the judgment of a lower court if it can be supported on any theory, including a theory different from that of such lower court.
>
> *Newcomb v. Dredge*, 105 Ohio App. 417 (1957) (Syllabus 1).

In the instant case the Petitioner does not attack the validity of the Ohio case law which holds that a public official is not liable for errors in judgment. Neither has the Petitioner ever denied the applicability of that law to this case. Petitioner argues only that the Court of Appeals should have ignored what it knew to be the law and reversed the judgment of the trial court.

The Ohio Court of Appeals had not only the right but indeed the duty to affirm the judgment of the trial court. No right of the Petitioner, Constitutional or otherwise, was violated by the Court of Appeals fulfilling its duty.

CONCLUSION

Petitioner's claims have been fully adjudicated in the courts of Ohio. The Petitioner fails to allege any constitutional violation which would require redress by this Court. It is therefore respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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